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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	MM Docket No. 92-266
and Competition Act of 1992:	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

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COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

Comcast Cable Communications, Inc. ("Comcast"), by its attorneys, hereby submits its comments in response to the Federal Communications Commission's *Further Notice of Proposed Rulemaking* in the above-referenced proceeding.[1]

INTRODUCTION AND SUMMARY

In this proceeding, the Commission proposes a complete revision of its formula for establishing the maximum reasonable rates that a cable operator may establish for commercial use of its channels, pursuant to Section 612 of the Communications Act of 1934, as amended. Instead of an "implicit fee" approach based on the established marketplace relations between cable operators and programmers, the Commission proposes a cost-based formula that is based solely on the supposed costs incurred by an operator in replacing particular designated channels with leased access programming. Whatever flaws and

1/ *Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking*, MM Dkt. No. 92-266, CS Dkt. No. 96-60, FCC 96-122 (rel. March 29, 1996) (the "*Further Notice*").

imperfections may exist in the current "highest implicit fee" formula, the proposed cost formula would produce far worse results.

There are two fundamental flaws with the Commission's cost-based approach. First, it is exceedingly complicated and burdensome to apply. Second, despite its complexity, it utterly fails to measure and drastically understates the costs associated with leased access because it treats as "too speculative" most of the true costs of adding leased access programming. As a result, the Commission's formula will distort the programming marketplace and will "adversely affect the operation, financial condition, or market development"[2] of cable systems — precisely the effects that Congress sought to avoid.

An implicit fee approach is superior in both respects. It is simple to calculate and easy to apply. And it establishes rates that more accurately reflect the market value of a channel than the proposed cost approach. To the extent that there are problems with the current implicit fee approach, it makes far more sense to modify and correct that approach than to replace it with a complicated cost formula that does not achieve what Congress intended.

Moreover, under the proposed approach, operators would be required to specify in advance those channels which will be leased. This proposal would financially harm operators and may give alternate providers a competitive advantage over cable operators.

In any event, part-time leased access rates should not be set by *pro rating* full-time rates. Such an approach is flawed because it fails to recognize the increased costs associated

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2/ 47 U.S.C. § 532(c)(1).

with carrying part-time programming and the revenue lost due to the inability of cable operators to program all twenty-four hours of a channel.

The Commission should adopt its proposal to require that a minimum of eight hours of programming be provided on part-time leased access channels before dark channels or channels that carry existing programming are made available for leased use. It would be unfair to operators, programmers, and the public to preempt the use of channels by cable program services when only a small amount of time is to be used for leased access.

The Commission requests comment on whether not-for-profit entities should be offered preferential rates. The Commission is not authorized to require — nor is there any public interest basis for — such a subsidy.

Finally, the Commission should not permit leased access programmers to resell time to other programmers. Allowing leased access users to resell time is contrary to Congress' intent and is unfair to cable operators.

I. THE PROPOSED COST-BASED APPROACH IS UNDULY BURDENSOME AND WILL NOT RESULT IN REASONABLE RATES.

The Commission has tentatively concluded that its objective in establishing maximum reasonable rates for leased access should be to "promote the use of the leased access set-aside channels without imposing an undue financial burden on the operator" and "without giving programmers a subsidy."[3/] Indeed, Congress did not intend leased access to impose *any* financial burden on the operator, much less an "undue" burden. The statute directs cable operators to establish prices, terms and conditions for leased access that are "at least

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3/ *Further Notice* at ¶ 65.

sufficient to assure that such use *will not adversely affect the operation, financial condition, or market development* of the cable system."[4/] A rate that enables cable operators to recover all the costs associated with making a channel available to a leased access programmer, plus a reasonable profit, would accomplish this objective. But the Commission's cost-based approach would not establish such a rate. It would instead produce maximum reasonable rates that *do* unduly burden cable operators and that result in unfair subsidies to leased access programmers.

The Commission's approach recognizes only two types of costs incurred by cable operators in making capacity available to leased access programmers. First, the Commission recognizes that there are fixed and variable *operating costs* that an operator incurs "regardless of what programming is carried over the channel."[5/] The Commission assumes, for purposes of its formula, that per-channel operating costs for tiered services are generally covered by subscriber fees for the tier. Therefore, if a system substitutes a leased access service for a tiered service, the Commission assumes that its operating costs will still be covered by its subscriber revenues from the tier. As discussed below, however, the substitution of a leased access service is likely to reduce the subscriber revenues an operator can recover from a tier by forcing the operator either to lower its rates or lose subscribers.

Second, the Commission's approach purports to take into account "*net opportunity costs*" — "the reasonable costs (or cost savings) that the operator incurs by leasing the channel to the leased access programmer that it would not have incurred had it continued

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4/ 47 U.S.C. § 532(c)(1) (emphasis added).

5/ *Further Notice* at ¶ 77.

with the current use of the channel."[6] The Commission acknowledges, however, that its proposed formula "does not incorporate all opportunity costs."[7] That is an understatement; in fact, the formula *ignores* most of the opportunity costs associated with leased access, because they are deemed "speculative"[8] and "not easily quantified."[9]

The only opportunity costs that the Commission recognizes are the costs associated with the *particular channel* on which the leased access programming is to be placed. Thus, if an operator bumps a service from which it received advertising revenues in order to make room for a leased access service, the *present* level of foregone advertising revenues would be viewed as the sole opportunity cost. Similarly, if the operator bumps a shopping service that pays sales commissions to the operator, only the *present* level of foregone commissions would be counted as an opportunity cost. The proposed formula does not recognize *future* advertising revenue or sales commissions as opportunity costs, even though cable operators often carry programming services that currently yield little or no revenue in the expectation that those services will produce substantial advertising revenues or sales commissions in the future. Under the proposed formula, any licensing fees that the operator had been required to pay for the bumped service would constitute a negative opportunity cost — a cost savings that would offset any foregone advertising revenues.

6/ *Id.* at ¶ 79.

7/ *Id.*

8/ *Id.* at ¶ 86.

9/ *Id.* at ¶ 79.

But the economic effects of adding or substituting a leased access service on a tier cannot be measured simply by calculating the foregone revenues, commissions and licensing fees associated with the previous use of the channel. Unless the leased access programming is as valuable to subscribers as the programming that it replaces, the system's subscriber revenues will be adversely affected. Either the system will reduce its rates to reflect the diminished value to subscribers, or it will lose subscribers. The Commission acknowledges that this could occur but refuses to take any such effect into account in its cost formula because it "is too speculative to measure accurately."[10/]

Moreover, leased access programming may diminish the value not only of the channel on which it is placed but also of *adjacent* channels and other channels on the same tier. As the Commission and the courts have repeatedly recognized, selecting and packaging programming is the core activity of the business of cable television.[11/] Channel placement is a significant consideration in packaging programming, because the extent to which a channel is viewed depends not only on the nature of the programming on that channel, but also on the nature of programming on surrounding channels. The value of cable channels, like parcels of real estate, depends on the quality of the surrounding "neighborhood" of channels. Not only can leased access programming reduce the value a cable operator can receive for the channel of programming it replaces, but it also can devalue the entire "neighborhood" of surrounding channels.

10/ *Id.* at ¶ 86.

11/ *See, e.g., City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 494 (1986); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

Furthermore, to the extent that the leased access programming attracts and diverts viewership from other services on the system, it may diminish any advertising revenues or shopping commissions that the operator derives from those services. In addition, to the extent that such diminished viewership reduces the potential advertising revenues of the programming services, they may insist on recovering more from the operator in subscriber fees — that is, they may increase their licensing fees to the operator.

None of these costs are taken into account by the Commission's proposed cost formula, and therefore the formula is virtually certain to undercompensate cable operators by a substantial amount. Moreover, contrary to the Commission's objectives, the cost formula will surely subsidize certain programmers. As the Commission recognized in adopting its implicit fee approach, cable operators typically establish different terms and conditions for different types of programmers.[12] By focusing solely on the costs and foregone revenues associated with the particular programming that is replaced by a leased access programmer, however, the cost formula establishes the same maximum reasonable rate regardless of the type of leased access programmer that may use the channel.

In sum, establishing reasonable rates for leased access requires far more than a simple balancing of the costs incurred and revenues received by an operator in connection with the previous use of the particular channel designated for leased access. To replicate or even approximate the terms and conditions entered into by operators and programmers in the video programming marketplace also requires taking into account the content and economics of the

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12/ *See Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5936 (1993) ("*Rate Order*").

leased access programmer, as well as that programmer's effect on the economics of the system as a whole. Indeed, as noted above, Congress *expected* the cable operator to take such matters into account in establishing reasonable rates.[13]

Any formula aimed at identifying all the costs incurred by an operator in making a leased access channel available would have to consider all these matters — and Congress did not expect the Commission to undertake such complicated cost-of-service ratemaking. Congress specifically prohibited the Commission from requiring cable operators to lease channels on a common carrier basis[14] (unless "cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available").[15] And, in any event, any effort to identify and quantify all such costs in a formulaic manner would be practically impossible.

Instead of seeking to set cost-based rates, a more fruitful approach would be to establish maximum reasonable rates by examining the rates, terms and conditions of channel use in the video programming marketplace. As we now show, that is what an "implicit fee" approach does. An implicit fee formula works far better as a surrogate for marketplace rates

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13/ *See* 47 U.S.C. § 532(c)(1), *supra*. *See also* 47 U.S.C. § 532(c)(2) ("A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, *except that an operator may consider such content to the minimum extent necessary to establish a reasonable price* for the commercial use of designated channel capacity by an unaffiliated person") (emphasis added).

14/ *See* 47 U.S.C. § 541(c).

15/ 47 U.S.C. 532(g).

than would a cost-based formula — especially the truncated cost-based formula proposed by the Commission.

II. A MARKET-BASED FORMULA FOR SETTING MAXIMUM REASONABLE RATES IS SUPERIOR TO A COST-BASED FORMULA.

An implicit fee approach recognizes that, in the marketplace, the amount that programmers implicitly pay for channel access is determined by a wide variety of factors, including the value of the service to subscribers and the value of the service to the cable operator in packaging and providing services to subscribers. For this reason alone, an implicit fee approach is far superior to a cost-based approach that focuses solely on the direct costs incurred by the operator in making a channel available and on the differences in the operator's costs and revenues between the leased access programmer and the former occupant of the channel. Moreover, the implicit fee formula is as easy to calculate as the Commission's proposed cost formula is difficult.[16/] Some revisions to the particular implicit

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16/ The implicit fee approach seeks to identify the range of rates that traditional cable programmers "implicitly" pay cable operators to be carried on their systems. Programmers do not, of course, typically pay for carriage. Usually, if anyone pays, it is the cable operator, who then resells the programming to subscribers. But what the Commission recognized in adopting the implicit fee approach was that this purchase and resale of programming by the operator could have been structured as a functionally equivalent lease agreement. Under such an agreement, the programmer would have paid the operator for carriage, and then would itself have resold the programming to subscribers, perhaps using the cable operator as a marketing and collection agent.

If a traditional programming agreement were recharacterized in this manner, the amount paid by the programmer to lease a channel (the implicit fee) would be equal to the amount that the operator currently charges subscribers for the programming *minus* the amount that the operator currently pays for the programming. This is the amount that the operator currently receives for carrying the programming — and under a market-based approach, the operator should receive an equivalent amount for leasing a channel to the same programmer pursuant to its leased access obligations fee formula currently used to establish leased access rates may be warranted, but the Commission's proposal to discard the implicit fee approach altogether in favor of the cost formula is not.

A. Any "Double Recovery" by Cable Operators is *De Minimis*.

Under an implicit fee approach, as discussed above, an operator is supposed to recover from the leased access programmer the difference between what they currently charge subscribers for similar programming and what they currently pay for such similar programming. Leased access programmers, meanwhile, are supposed to recover from subscribers the amount that the cable operator currently charges subscribers for similar programming.

For *à la carte* leased access programmers, this is exactly how the current rules work. The programmer leases a channel at a rate that reflects the net amount that the cable operator typically receives from offering other *à la carte* program services on its system. Then, the programmer sells its service directly to subscribers and, depending on the value of the service to subscribers, receives more or less than the typical premium programmer on the system. But leased access programmers that choose to be placed on a tier and do not choose to market their service directly to subscribers have no way to recover any subscriber fees for the service. Instead, the *cable operator* recovers subscriber fees for the tier that includes the leased access channel.

In the Commission's view, this is a critical flaw insofar as it "appears to allow double recovery of subscriber revenues (or 'double billing') by the operator."[17] In fact, however, it is extremely unlikely that the amount that the cable operator receives from subscribers for carrying the leased access channel will constitute a *double* recovery; in most cases, that additional amount will be close to or equal to zero For purposes of calculating the implicit fee paid by each channel on a tier, the Commission's current formula assumes that the amount paid by subscribers for each channel on the tier is an identical amount — specifically, the total price for the tier divided by the number of channels. But, in fact, the value of any leased access programming to subscribers is likely to be significantly lower than the average per-channel price for the tier on which it is carried. Indeed, there is no reason to believe that subscribers would pay anything at all for most leased access programming — which is, after all, programming that the operator has chosen not to pay for and not to carry, even at no charge to the operator.

Therefore, while it is likely that a channel selected by the operator might add value to the tier and therefore might generate immediate or future subscriber revenues, adding or substituting a leased access channel is unlikely to have such an effect. The implicit fee formula is intended to compensate cable operators for the foregone implicit access fees that they might have received from entering into carriage agreements with programmers of their choice. But while *those* programmers might, in a leased access environment, be able to recover an equivalent amount from subscribers, it is extremely doubtful that other leased access programmers could. Especially since leased access programmers are not *required* to

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17/ *Further Notice* at ¶ 29

include their programming on a tier and may opt to offer their service on an *à la carte* basis, it is reasonable to assume that the amount of subscriber fees attributable to leased access programmers that opt to be included on tiers -- and therefore the magnitude of the "double recovery" problem — is *de minimis.*

B. It is Reasonable to Allow Cable Operators to Charge the *Highest* Implicit Fee.

The Commission is also concerned that allowing operators to charge the *highest* implicit access fee overcompensates cable operators because, by definition, operators are "accepting less than the highest implicit fee from many non-leased access programmers."[18/] According to the Commission, this means that the highest implicit fee "is likely to overcompensate the operator compared to the amount the operator is *willing to accept.*"[19/] But the fact that an operator is "willing to accept" less than the highest implicit fee from a programmer that it *chooses* to carry does not necessarily mean that it should be required to accept less from a leased access programmer that it would otherwise choose not to carry.

Cable operators typically receive benefits from carrying programmers of their choice, in addition to any revenues that they receive from subscribers — benefits that may not accrue from the carriage of leased access programming. For example, operators often receive local advertising availabilities from cable programmers and may accept less than the highest implicit fee from programmers that offer such availabilities. They generally receive no such advertising availabilities and revenues from leased access programmers.

18/ *Id.* at ¶ 30.

19/ *Id.* (emphasis added).

Moreover, cable operators typically select programming that appeals to diverse audiences, in order to maximize their subscribership and their advertising revenues. They may be willing to accept less than the highest implicit fee from a programmer that appeals to an unserved niche audience and complements their existing offerings. Leased access programmers, however, have no reason to be concerned with the effect that their service may have on the system's subscriber penetration, its rates, or its advertising revenues.

In addition, cable operators may be willing to accept less than the highest implicit fee from services that are not yet profitable and have not yet attracted significant viewership but are deemed likely to blossom into popular, high-quality services. Leased access program services are not subject to any such editorial expertise and judgment. Indeed, one of Congress' primary goals in adopting leased access was to "separate[] editorial control over a limited number of cable channels from ownership of the cable system itself."[20/] Certainly cable operators would factor this inability to exert editorial control over leased access channels into the fee they would be willing to accept from leased access programmers.

For all these reasons, it is not at all unreasonable for cable operators to be allowed to charge leased access programmers the highest implicit fee that they receive from non-leased access programmers. The highest implicit fee represents the marketplace value of a channel to cable operators and to leased access programmers who supply operators with none of the benefits that they typically receive from other programmers on their systems. And this marketplace approach is preferable to the proposed cost-based approach, because it takes into account the opportunity costs that the cost-based approach ignores. It is also preferable to

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20/ H.R. Rep. No. 934, 98th Cong., 2d Sess. 31 (1984) ("House Report").

the proposed cost-based approach because, as crafted by the Commission, it distinguishes among premium per-channel services, shopping services, and tiered services in a manner that reflects the different economics of the three types of services.

III. PART-TIME LEASED ACCESS RATES ARE CURRENTLY TOO LOW AND MUST BE HIGHER THAN THE RATES FOR FULL-TIME LEASED ACCESS.

The Commission has concluded, for purposes of its current "highest implicit fee" approach, that "proration of the maximum rate with time of day pricing is an appropriate method for establishing *part-time* rates."[21/] It seeks comment on whether such a method would also be appropriate under the proposed cost formula. Even under the current approach, proration of maximum full-time rates is the wrong way to establish rates for part-time leasing of channels. And using such proration under the proposed cost formula which would lower part-time rates even further would be especially inappropriate.

The notion that part-time rates should be set so that, if all time is leased, the operator's total revenues will be no greater than the rate for full-time lessees does not reflect the additional costs inherent in providing part-time leased access. Simply in terms of the costs imposed upon cable operators, it seems obvious that part-time rates should be substantially *higher* than the prorated rates for full-time use. First, part-time programming substantially increases the transaction costs of leased access. Instead of negotiating with a single programmer to lease all twenty-four hours of programming on a channel, cable operators must reach separate leased access agreements with a number of programmers who wish to use only a portion of the available time. Negotiating costs are further increased by

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21/ *Further Notice* at ¶ 102 (emphasis added).

the need to coordinate among the various part-time programmers to ensure that their programming time slots do not overlap. The costs of negotiating renewals of these leased access agreements would be greater for multiple agreements than for a single agreement.

A higher rate for part-time leased access would compensate cable operators for the higher transaction costs of low-volume purchases of time. Other media offer discounts for volume purchases of advertising time or space because of the savings in transaction costs inherent in volume purchases. While these "bulk discounts" are by no means unique to the media industry, the Commission's existing leased access rate structure forces cable operators to treat all purchases the same, regardless of volume.[22/] Cable operators should be allowed to charge a premium for low-volume purchases of leased access time, just as their counterparts in the print and broadcast media do.

Second, part-time leased access makes it practically impossible for cable operators to sell all of their inventory — twenty-four hours a day, every day, on a particular leased access channel. Cable operators can virtually never integrate part-time programmers into a seamless twenty-four hours of programming. Part-time programmers' demands for distinct time slots almost invariably results in some "gaps" in the programming day, time for which the cable operator receives no compensation.[23/] It is axiomatic that businesses concerned about

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22/ The ability of cable operators to charge different rates for different parts of the day should not be confused with the ability to charge different rates for different *volumes* of programming time purchased. For example, although a one-hour block of programming during prime time may cost more than a three-hour block in a less-attractive time slot, cable operators would still be unable to charge a higher rate for a one-hour block of programming than for a three-hour block within the same time slot.

23/ In addition to the cost of unprogrammed (and unsold) time, part-time programming (continued...)

"vacancies" and unused inventory will charge higher rates for shorter leases. For example, daily rates for hotels are, of course, higher on a per-day basis than yearly or month-to-month rental rates. Rates for short-term car rentals are higher than rates for long-term leases. Cable operators should similarly be allowed to charge higher rates for part-time leased access to account for the likelihood of programming "gaps" and unused time.

But wholly apart from the increased transaction costs of part-time leasing and the unlikelihood of leasing an entire channel to part-time users, linking part-time rates to full-time rates fails to recognize that the markets for full-time and part-time programming are distinct. Full-time lessees resemble and compete with cable programming networks, and it is therefore reasonable to peg rates for full-time leased access at levels that reflect the marketplace terms and conditions on which cable networks obtain access to cable systems. This, of course, is what the implicit fee approach does.

Part-time leased access, on the other hand, more closely parallels the purchase of *advertising* time on broadcast channels and on cable programming networks and services. There is already a competitive and functioning market for the sale of time, in part-time blocks, for infomercials and other short-form programming on broadcast channels and cable programming services. The prevailing rates in that market are a more appropriate indicator of reasonable rates for part-time leased access than the prorated maximum rates for full-time channel leasing.

23/ (...continued)
imposes a further cost on cable operators by lowering the value of a channel to subscribers. Subscribers attach a lower value to channels with fragmented programming than to channels programmed by a single service.

If the Commission sets rates for part-time leased access that are lower than these market-based rates even after making allowances for the difference in potential audience reach of a cable system and a broadcast station serving an entire market, cable operators will be forced unfairly to subsidize infomercials and other short-form programming. And the effect of this subsidization will be to skew the existing marketplace, shifting infomercial and short-form paid programming away from broadcasters and cable programmers to the artificially low-priced leased access channels. Indeed, there is convincing evidence that this is already occurring under the existing rules. The following chart compares the cost of a half-hour of time on local broadcast stations and on leased access channels on Comcast cable systems.

Market	Station	Affiliation	½-Hour Rate Prime	½-Hour Rate Non-Prime	Comcast System Rate
Richmond, VA	WWBT	NBC	$10,000	$2,000	$28
Charleston, SC	WCBD	ABC	$1,500	$150-$600	$26
Meridian, MS	WTOK	ABC	$2,500	$175-$225	$8
West Palm Beach, FL	WTVX	Independent	$2,500	$500	$34
Paducah, KY	KBSI	FOX	$2,000	$500	$12
Fort Wayne, IN	WFFT	FOX	$1,000	$550	$34
Philadelphia, PA	WGTW	Independent	N/A	$2,000	$31

As the chart illustrates, the leased access rates in Richmond, VA and Meridian, MS represent *only 0.3%* of the rates for a half-hour broadcast in prime time. Even in non-prime time, the leased access rates in Philadelphia and Richmond are *only about 1.5%* of the rates for comparable broadcast time.

If the Commission establishes a formula that reduces the maximum reasonable rates for full-time leased access, a *pro rata* approach for part-time leased access would drive part-time rates even lower, creating an even greater subsidy with even greater disruptive effects on the marketplace for the sale of infomercials and other short-form programming — even though virtually no one seriously contends that *part-time* leased access rates under the current formula are too high. Indeed, many systems currently have a vibrant market for part-time leased access programming. This vibrant market for part-time programming indicates that current rates for part-time leased access are not prohibitive. It is more likely that, for the reasons discussed above, they are too *low*.

In sum, if the Commission adopts the proposed cost formula for full-time rates or lowers the full-time rates under any method, it should not use a *pro rata* approach for part-time rates but should instead adopt an approach that recognizes the additional costs associated with part-time use and the different markets in which full-time and part-time leased access programmers compete. Maximum reasonable part-time rates should be set at prevailing market levels for the sale of comparable time by broadcast stations and cable programming services. And even if a *pro rata* approach is adopted, there should be an additional premium or surcharge based on the additional costs associated with part-time leasing of channels.

IV. THE COMMISSION CANNOT REQUIRE CABLE OPERATORS TO IDENTIFY IN ADVANCE THE CHANNELS TO BE USED FOR LEASED ACCESS.

In order to derive a leased access rate under its proposed cost formula, the Commission proposes to require operators to identify publicly the channels it will use to satisfy the leased access set-aside amount prior to receiving any leased access requests.[24/] The Communications Act, however, does not authorize the Commission to impose a channel designation requirement upon cable operators. Indeed, the Commission cannot impose this designation requirement, because it would financially disadvantage cable operators by forcing them to disclose competitively harmful information and by limiting their ability to respond to consumer demand and competition from other providers of video programming.

As discussed above, Section 612(c)(1) of the Communications Act specifically prohibits the price, terms and conditions of leased access from imposing financial hardships upon cable operators.[25/] If operators are required to designate and disclose certain channels that may be used for leased access purposes in the future, negotiations with non-leased access programmers for use of these channels will be affected. Programmers will insist on more favorable terms for use of these channels than for channels which are not designated for leased access use. Even if no leased access programmer ever requests the use of these channels, operators will still be forced to accept less favorable terms from non-leased access users of these channels. Congress did not intend for leased access to impose this type of financial hardship on operators.

Furthermore, adoption of a specific channel designation rule would render operators unable to respond to customer demand in programming. Operators' choices of what channels to use or what existing programming to bump could depend upon the type of programming to be placed on a leased access channel. Operators might want to bump programming similar

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24/ *Id.* at ¶ 76.

25/ *Id.*

to that offered by a leased access user — even if this programming were not located on a designated leased access channel — to avoid having duplicative programming on their systems. Rigid adherence to previously designated leased access channels would limit cable operators' ability to make business decisions regarding their systems and would hamper their ability to compete with other sources of programming.

In the *Further Notice*, the Commission seeks comment on its proposal to restrict operators from designating their highest valued channels to inflate the leased access maximum rate.[26/] As a practical matter cable operators are not willing to designate and take the risk of having to bump their most valued services for leased access programming, which has little or no value to subscribers. Any loss in subscriber penetration and goodwill could not be recovered through any charge to the leased access programmer. Operators would lose much more than they would gain by employing this tactic.

V. OPERATORS SHOULD NOT BE REQUIRED TO MAKE CHANNELS AVAILABLE FOR LESS THAN EIGHT HOURS OF USE.

Comcast agrees with the Commission's tentative conclusion that cable operators should not be required to bump existing programming or make dark channels available to accommodate leased access programming unless at least eight hours of time are booked on the channel.[27/] As the Commission recognizes, accommodating a leased access request by bumping existing programming may cause "substantially greater harm to the subscribers, the

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26/ *Further Notice* at ¶ 76.

27/ *Further Notice* at ¶¶ 124-125.

operator, and the non-leased access programmer."[28] In order to avoid such harm, the Commission should require leased access programmers to use (or pay for) at least eight hours of programming on a channel before existing programming on that channel can be bumped. This eight-hour time span should include prime time, as this time period affects the greatest number of viewers and is the most valuable (in terms of the rate charged programmers) to operators.

The Commission has proposed to adopt the holding in *TV-24 Sarasota, Inc. v. Comcast* that existing programming does not have to be bumped if "reasonable accommodation in a comparable time slot" exists for leased access programmers.[29] The *Sarasota* standard is fair and reasonable and should be adopted. It is not reasonable for leased access programmers to expect to receive the exact time slot requested when such access would require the removal of existing programming. Providing leased access programmers with time slots that are reasonably comparable to those requested fully satisfies the goals of leased access.

Additionally, the Commission should not require operators to bump programming from a channel unless leased access programmers commit to using the channel for at least a one-year period. Operators should not be required to bump existing programming for leased access programmers who will use the channel for only brief periods of time. It is burdensome for the operator to bump programming, and even more burdensome to have to reprogram a channel with non-leased access programming once the leased access programmer

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28/ *Id.* at ¶ 124.

29/ *Id.*

no longer wishes to use the channel. A one-year minimum commitment from leased access programmers would benefit viewers, cable operators and ultimately even leased access programmers themselves by ensuring stability in the programming available to viewers.

The Commission is also correct in concluding that *dark* channels should not be opened to accommodate a minimal amount of leased access programming.[30/] Operators incur opportunity costs when they lose the ability to carry new programming on a dark channel, similar to the opportunity costs lost when existing programming must be bumped. It is unfair to require an operator to forgo the future value of a new programming channel to carry leased access programming, unless the operator is guaranteed to recover revenue from an eight-hour period, including prime time, for a one-year period.

VI. LEASED ACCESS PROGRAMMERS SHOULD NOT BE ABLE TO RESELL CHANNEL SPACE.

In the *Further Notice*, the Commission requests comment on whether leased access users should be allowed to resell leased access time to other programmers.[31/] Allowing this type of resale is contrary to Congressional intent and is unfair to cable operators and to leased access programmers.

The existing and proposed leased access rules set the maximum rate that operators may charge leased access programmers for channel access. If resale of this channel space is allowed, the channel lessees could sublease the space to other programmers at a higher fee, eliminating the intended benefits to leased access programmers of the maximum rate

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30/ *Id.* at ¶ 125.

31/ *Further Notice* at ¶ 141.

requirements. Moreover, while the leased access rules limit cable operators' ability to determine what programming to include on their tiers, resellers would have unfettered editorial control over program content. They would thus be much better able than cable operators to maximize the commercial value of leased access channels.

Reselling channel space is not consistent with any of the policy goals of leased access. It is unfair for operators, who build and invest in their cable systems, to be required to subsidize leased access programmers' business of renting channel space to others. Congress intended no such subsidy, and it did not intend to create a new business of "cable channel space retail." Indeed, if the maximum rate established by the Commission accurately reflects the prevailing market rates for access, as the law requires, there will be no market for resale of leased access capacity.

VII. THE COMMISSION HAS NO AUTHORITY TO ESTABLISH PREFERENTIAL LEASED ACCESS RATES OR SET-ASIDES FOR NOT-FOR-PROFIT PROGRAMMERS.

Given a framework in which the maximum rate cable operators can charge leased access programmers is tied to the costs of making that channel available, any preferential rates for not-for-profit programmers would necessarily force operators to provide channel capacity *below cost*.[32/] In adopting the leased access requirements in 1984, Congress

32/ In fact, the adoption of preferential leased access rates for not-for-profit programmers concurrently with the Commission's proposed adoption of its cost formula would produce precisely the result Congress sought to prevent: the subsidization of leased access programming by cable operators.